Truth or dare?

Blasphemy and the flawed logic of E.S. v. Austria

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On 25 October 2018, the European Court of Human Rights (ECtHR) handed down its decision in the case of *E.S. v. Austria*. The case had begun in the fall 2009 when the anonymized applicant E.S., who is a member of the far-right Austrian Freedom Party (FPÖ), gave two seminars about Islam. On this occasion she claimed that Muhammad, the most important prophet of Islam, was not a perfect human because he "liked to do it with children" and that his marriage to the six years old Aisha amounted to pedophilia. Present at one of the seminars was an undercover journalist, whose publisher subsequently reported E.S. to the police.

E.S. was charged with two different offenses: on the one hand, inciting hatred (*Verhetzung*) and on the other hand, disparaging religious doctrines (*Herabwürdigung religiöser Lehren*) or – in common parlor – blasphemy. However, E.S. was acquitted for the former offense and only punished pursuant to Art. 188 in the Austrian Criminal Code, which criminalizes "whoever, in circumstances where his behavior is apt to arouse justified indignation, publicly disparages or insults a person who, or an object which, is an object of veneration of a church or religious community established within the country […]".

The applicant's case was tried by the Vienna Regional Court, the Vienna Court of Appeals, and the Austrian Supreme Court, who all found that her statements had violated Art. 188. Finally, the case ended in Strasbourg, where the ECtHR found that the national authorities had applied Art. 10 of the European Convention on Human Rights (ECHR) (freedom of expression) correctly and thus did not find a human rights violation.

In the following, I will argue that with this decision, the Court not only buttresses the blasphemy ban, it also blurs the line between hate speech and blasphemy. Furthermore, the Court follows the Austrian authorities down the rabbit hole in an absurd discussion of the degree of truth in the applicant's statements. In the entire exercise, the Court applies incoherent standards for what is to be considered acceptable speech henceforth.

I. Buttressing blasphemy bans

By merely checking whether the national authorities manifestly have overstepped their mandate, the Court avoids the underlying question of whether blasphemy bans generally pursue a legitimate aim in a democratic society. One could argue that the Court just follows its established case law on the matter (*Otto-Preminger-Institut v. Austria*, *Wingrove v. United Kingdom*, and *#.A. v. Turkey*). However, the latest

of these cases was decided in the fall 2005, and in the meantime, the question of blasphemy has not remained static.

Not only have multiple European states repealed their blasphemy bans, several international institutions have recommended the total abolishment of blasphemy as a criminal offense. Most important in the context of the ECHR is the Parliamentary Assembly of the Council of Europe (PACE) Res. 1510 (2006) and Rec. 1805 (2007) as well as the subsequent study 406/2006 by the Venice Commission.

The PACE unequivocally recommends that “national law should only penalise expressions about religious matters which intentionally and severely disturb public order and call for public violence.” It further recommends that the Committee of Ministers ensures that national law is “reviewed in order to decriminalise blasphemy as an insult to a religion.” The Venice Commission is equally clear when concluding that “the offence of blasphemy should be abolished”. Of course, the PACE and the Venice Commission are not arguing for a more polemic debate about religion, but both institutions agree that we should be beyond using criminal sanctions as a tool to teach civic behavior.

The Court walked a fine line and ultimately chose the conservative solution over the courageous; thus lending its legitimacy to a way of thinking about religion and freedom of expression that is rapidly becoming outdated. Thus, activists challenging the remaining blasphemy bans in Europe cannot be certain that the ECtHR will have their back.

II. Blurred lines

In its attempt to fit the purpose of the Austrian blasphemy ban under Art. 10(2) of the ECHR, the Court allows the national authorities to blur the line between hate speech and blasphemy. Thus, the Court does not challenge the Vienna Court of Appeal, when it argues that the applicant’s “statements showed her intention to unnecessarily disparage and deride Muslims.” (§ 18) It should be kept in mind that E.S. was acquitted for the offense of incitement to hatred, and that the blasphemy provision contains no element of incitement to hatred or violence.

In fact, the ECtHR in its own reasoning contributes to the confusion by reiterating that “a religious group must tolerate the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith, as long as the statements at issue do not incite hatred or religious intolerance” (§ 52), and that “the applicant was wrong to assume that improper attacks on religious groups had to be tolerated” (§ 55).

By allowing this obfuscation, the Court not only does a bad job at distinguishing between attacks on people and attacks on ideas; it also feeds into a destructive radical freedom of speech discourse that only serves far-right demagogues.

III. Truth and myth

Just as the broad margin of appreciation led the ECtHR to accept the Austrian courts' flawed application of the blasphemy provision, it also drags the Strasbourg judges into a wholly absurd discussion of truth.

In a questionable line of argument, the Vienna Court of Appeal concluded that the applicant's statements were "wrong and offensive, even if Muhammad had married a six-year-old and had intercourse with her when she had been nine." (§ 17) This is because E.S. could not prove that Muhammad's "primary sexual interest in Aisha had been her not yet having reached puberty" or that he had had sex with other children than Aisha (§ 18). This means that the Austrian authorities – in line with the legal basis – punished E.S. for the manner of her statements, rather than the content.

In other words, to use the word pedophile for an adult who has sex with one child without that being his primary sexual interest is a misnomer. This misnomer was arguably chosen for its provocative effect, but that does mean that the accusation was made out of thin air.

However, to consider truth at all when discussing blasphemy seems out of place, since it is perfectly possible that a statement can be both true and blasphemous or – in the words of the law – "apt to arouse justified indignation".

Not only does the ECtHR accept this flawed logic; it even takes it a step further by calling the applicant's statements "(manifestly) untrue facts" (§ 55), despite the fact that the national courts indirectly had acknowledged the content of her statements, but punished her for the insensitive choice of terminology.

IV. Provokingly inoffensive

In order to make this entire exercise possible, the ECtHR uses multiple different standards for what are acceptable expressions under the ECHR.

Initially, the Court reasserts its classical position that the Convention is not only applicable to ideas that are "favourably received or regarded as inoffensive or as a matter of indifference, but also those that offend, shock or disturb" (§ 42), but that in exercising the freedom of expression, the individual has a duty to avoid expressions that are "gratuitously offensive to others" (§ 43). The standard is thus a negative one: everything that is not "gratuitously offensive" may still "offend, shock or disturb". On their side, religious people "must tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith" (§ 42).

But as the reasoning progresses, this threshold for what may be considered acceptable and thereby protected speech gets increasingly higher:

> "The applicant therefore could not assume that there would only be like-minded people in the room who would share her very critical views of Islam, but had to expect that there could also be people among the audience who might be offended by her statements." (§ 51)

> "[The statements] had not been made in an objective manner aiming at contributing to a debate of public interest, but could only be understood as having been aimed at demonstrating that Muhammad was not a worthy subject of worship." (§ 52)
>
> "[T]he Court considers that the impugned statements were not phrased in a neutral manner aimed at being an objective contribution to a public debate concerning child marriages." (§ 57)

Instead of sticking to the negative definition, the Court thus begins to apply positive requirements. So not only must the expression not be gratuitously offensive, it has to also contribute objectively and neutrally to a debate of public interest or only be uttered in the company of like-minded people. This is an unreasonably high threshold for expressions worthy of protection.

V. Concluding remarks

In *E.S. v. Austria*, the ECtHR goes too far in accommodating the national authorities' flawed interpretation of the ECHR. In doing so, the Court not only misses an opportunity to strike down an outdated blasphemy law, it also blurs the distinction between hate speech and blasphemy, rather than clarifying the fundamental moral difference between attacking individuals and attacking ideas. Finally, it sends confusing signals about what sorts of expression the Convention actually protects.

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